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25
26
27 UNITED STATES DISTRICT COURT
28 NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

29 ARISTA NETWORKS, INC.,

30 Plaintiff,

31 v.

32 CISCO SYSTEMS, INC.,

33 Defendant.

34 Case No. 5:16-CV-00923-BLF

35
36 **ARISTA NETWORKS, INC.'S TRIAL
37 BRIEF**

38 Date: August 6, 2018

39 Judge: Hon. Beth Labson Freeman

40 Dept: Courtroom 3, 5TH Floor

41 Date Filed: July 30, 2018

42 Trial Date: August 6, 2018

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44 **DEMAND FOR JURY TRIAL**

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47 **REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED**

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1 **I. INTRODUCTION**

2 Arista asserts claims against Cisco for unlawful monopolization and attempted monopolization
3 under Section 2 of the Sherman Act and violation of Section 17200 of the California Business and
4 Professional Code.

5 Arista contends that Cisco’s “open early, closed late” conduct in connection with its Command
6 Line Interface (“CLI”), used to configure and manage networking equipment including Ethernet
7 Switches, constitutes an antitrust violation. Specifically, Arista contends that Cisco has monopoly power
8 in the U.S. and global markets for Ethernet switches. Ethernet switches are devices that control data
9 flow within a network to enable network components to communicate efficiently. They are the
10 fundamental building blocks of modern local area networks, deployed in virtually every modern
11 business and government office. Arista also asserts that Cisco has monopoly power in the U.S. and
12 global markets for high-speed Ethernet switches, and the overall market for Ethernet switches.

13 Arista contends that for over a decade, Cisco encouraged customers and competitors to invest in
14 and adopt Cisco’s CLI. This practice was effectuated, among other ways, through Cisco’s
15 representations that its CLI was an “industry standard,” and without independent assertion of copyright
16 or other intellectual property rights in the CLI commands.

17 Customers wanted this open standard so that their investments in learning the commands and
18 writing scripts that incorporate them would not lock them into using Cisco’s products exclusively,
19 because the same commands could be used to operate other vendors’ switches. Arista further contends
20 that for over a decade, Cisco knew that other Ethernet switch competitors used these common CLI
21 commands. Arista contends that despite knowing for years that Arista and other competitors had adopted
22 Cisco-like CLIs, prior to 2014 Cisco made no statements that asserted intellectual property or other
23 proprietary rights in the Cisco CLI itself.

24 However, Arista contends that in 2014, Cisco reversed its long-standing practice that the Cisco
25 CLI was open and nonproprietary. Arista, like many other Cisco competitors, had adopted many of
26 Cisco’s CLI commands based on Cisco’s encouragement and its inaction in the face of widespread
27 industry adoption of a common CLI. Nevertheless, Cisco closed the CLI by declaring in a series of blog
28 posts directed to the industry, including directly to customers, that its CLI was reserved exclusively for

1 use with Cisco's products. Cisco further acted to close the CLI by filing a copyright infringement lawsuit
2 against Arista based on Arista's use of 514 CLI commands Cisco contended were its copyrighted
3 intellectual property. Arista contends that it has been harmed as a result of Cisco's actions, including
4 lost switch sales. Arista further contends that Cisco's actions caused competitive harm by, *inter alia*,
5 reducing consumer welfare and decreasing innovation in the relevant markets.

6 **II. FACTUAL BACKGROUND**

7 Arista (initially called Arastra) was founded in 2004 by technology-industry pioneers including
8 Andy Bechtolsheim, founder of Sun Microsystems. After years of development, Arista launched its first
9 Ethernet switch in 2008. Since its founding, Arista has pioneered a revolutionary approach to scalable,
10 high-speed Ethernet switches with high-port density and low-latency. Arista's hardware and software
11 deliberately broke from legacy designs in order to meet the demands of the growing market of cloud
12 computing. Arista's switches offer extremely reliable and stable performance, dramatically lower power
13 consumption, faster switching, and fully customizable features. Today, Arista's switches are being used
14 in both data center and enterprise applications at cloud computing companies, financial services
15 companies, social media companies, e-commerce companies, as well as government agencies.

16 Like most of the industry, the CLI of Arista's switches recognized a common, industry standard
17 language. This common language was largely comprised of acronyms, protocol names and parameters
18 derived from well-known networking standards (*e.g.*, "BGP," "OSPF," "Ethernet"). Those public
19 domain sources were combined with terms derived from common usage amongst network engineers,
20 such as "router," "default," "hostname," and terms Cisco's early engineers borrowed from pre-existing
21 operating systems (*e.g.*, "show," "clear"). Cisco—which held upwards of 80% market share in various
22 networking markets over the past two decades—and most of the rest of the industry referred to this
23 common language as the "industry standard CLI."

24 Since at least the late 1990s, many networking equipment vendors, such as Dell, HP, and IBM
25 openly promoted their products as interoperable with the Cisco CLI, touting their CLIs as "industry
26 standard" or "Cisco-like," and assured customers that they would not need to learn a new command
27 language. Cisco knew of these claims, and of the widespread emulation of its CLI across the industry,
28 and yet Cisco never complained or took action to stop them. On the contrary, Cisco itself marketed its

1 command set as an “industry standard CLI.” The only objection Cisco ever raised to another company’s
 2 use of similarities in the user interface was a lawsuit it filed against Huawei in 2003 after it discovered
 3 that Huawei had misappropriated large portions of proprietary Cisco source code. But Cisco never
 4 complained about the many other companies who, unlike Huawei, did not use Cisco’s source code but
 5 built equipment that also responded to the industry standard CLI commands. As to Arista, Cisco knew
 6 that Arista’s switches recognized the same industry standard CLI for more than six years but never
 7 registered any complaint whatsoever before filing a copyright lawsuit against Arista in 2014. *Cisco Sys.,*
 8 *Inc. v. Arista Networks, Inc.*, No. 5:14-cv-05344 (N.D. Cal.).

9 Cisco’s policy of tolerating and even encouraging adoption of a common CLI came to an end in
 10 2014 after years of trying and failing to compete with Arista, and following a string of high-profile losses
 11 to Arista with major customers. In a desperate effort to maintain its market dominance, Cisco determined
 12 to move beyond competition on the merits and find another way to stop Arista – a plan crafted and
 13 approved at the highest levels of the company. Cisco did so by publicly announcing to the networking
 14 industry, through the press and through the web blog of its general counsel, that it now declared the CLI
 15 to be Cisco’s proprietary intellectual property, to be used by no company other than Cisco. It effected
 16 this announcement by, *inter alia*, filing a copyright infringement lawsuit against Arista, marking the first
 17 time that Cisco had asserted intellectual property rights or other proprietary rights in the CLI commands
 18 and command structure, standing alone. Cisco further got “down and dirty,” engaging in a focused
 19 campaign of raising “FUD” (shorthand for “Fear, Uncertainty, and Doubt”) in the minds of customers
 20 and suppliers regarding Arista’s products and its ethics.

21 **III. FACTUAL AND LEGAL ISSUES**

22 **A. Unlawful Monopolization/Attempted Monopolization**

23 **1. Cisco had monopoly power or a specific intent to achieve monopoly** 24 **power in the Ethernet Switch Markets and/or High-Speed Ethernet** 25 **Switch Markets during the past decade**

26 Arista will present factual evidence and expert testimony that Cisco has substantial market power
 27 in the supply of Ethernet Switches and High-Speed Ethernet Switches.

28 Dr. Fiona Scott Morton will testify that in both the Ethernet Switch and High-Speed Ethernet

1 Switch markets, Cisco has held a substantial market share for an extended period of time. For example,
 2 since 2004, Cisco's share of Ethernet switch revenue in the United States and the world remained above
 3 70% and 60% respectively, sometimes approaching 80% and 70% respectively until recently. *See, e.g.*,
 4 [Scott Morton Rpt., ¶ 98]. Prior to 2013, Cisco's share of High-Speed Ethernet switch revenue in the
 5 United States and the world was roughly 70% and 65% respectively, diminishing only beginning in 2013
 6 with the rise of Arista. *See, e.g.*, [Scott Morton Rpt., ¶ 99]. No single competitor has attained more than
 7 an 18.2% and 11.1% share, respectively. *See, e.g.*, [Scott Morton Rpt., ¶ 99].

8 Dr. Scott Morton will testify that Cisco has by far, the largest installed base of Ethernet switches.
 9 *See, e.g.*, [Scott Morton Rpt., ¶ 101]. In 2015, Cisco estimated that its products made up 80% of the
 10 "network installed base." *See, e.g.*, [Scott Morton Rpt., ¶ 101; Trial Exhibit 8 at 8.00005]. Dr. Scott
 11 Morton will further testify that this large installed base means that compatibility with Cisco switches via
 12 a common set of CLI commands is important for a competitor attempting to enter and establish itself in
 13 the switch market. *See, e.g.*, [Scott Morton Rpt., ¶ 102]. Cisco has referred to its industry standard CLI
 14 as [REDACTED] *See, e.g.*, [6/7/2016 Frank Palumbo Dep. at 21:8-22:23 (Copyright)]. Dr. Scott Morton
 15 will testify that the threat of not being able to use industry standard CLI commands may exclude
 16 competitors from entering the market or gaining market share. *See, e.g.*, [Scott Morton Rpt., ¶¶ 103,
 17 104].

18 Cisco's stature within the networking industry led the industry to be described colloquially as
 19 "Cisco and the seven dwarfs". *See, e.g.*, [11/7/2017 Anshul Sadana Dep. at 96:23-97:8; 2/25/2016
 20 Jayshree Ullal Dep. at 176:6-10 (Copyright)]. Dr. Scott Morton will testify that to compete on an equal
 21 footing with Cisco, a potential market entrant would need hundreds of millions of dollars and many
 22 years to develop and customize new switch products. *See, e.g.*, [Scott Morton Rpt., ¶ 104]. Those
 23 companies that did try to compete, the "dwarfs," were often large companies with strong market
 24 positions in other segments but were still unable to gain a sizable share in the Ethernet Switch market.
 25 *See, e.g.*, [Scott Morton Rpt., ¶ 106]. Dr. Scott Morton will testify that no competitor of Cisco in the
 26 United States has had a substantial impact on Cisco's market shares until the arrival of Arista in 2008
 27 and its increasing share in the High-Speed Ethernet switch market. *See, e.g.*, [Scott Morton Rpt., ¶ 105].

28 Dr. Scott Morton will testify that another indication of Cisco's market power is its sustained

1 ability to charge a significant premium for its products relative to what its competitors charge. *See, e.g.*,
 2 [Scott Morton Rpt., ¶ 107].

3 **2. The Ethernet switches over which Cisco had monopoly power or**
 4 **attempted to have monopoly power were goods in interstate or foreign**
 5 **commerce**

6 As noted in the parties' joint proposed jury instructions, the parties agreed that this element is
 7 met. Specifically, "That Cisco's conduct occurred in or affected interstate or foreign commerce is also
 8 an element of Arista's monopolization and attempted monopolization claims; however, Cisco does not
 9 dispute that this element is satisfied for both of Arista's claims, so the parties agree not to instruct the
 10 jury regarding this element." ECF No. 321-04 at 32n.

11 **3. Cisco knowingly acquired or maintained monopoly power through**
 12 **anticompetitive conduct and/or engaged in anticompetitive conduct to**
 13 **accomplish its intended goal of achieving a monopoly**

14 Arista will present fact evidence and expert testimony that Cisco knowingly acquired or
 15 maintained monopoly power through anticompetitive conduct and/or engaged in anticompetitive
 16 conduct to accomplish its intended goal of achieving monopoly.

17 From 2012-2014, Arista experienced growing revenue and market share. *See, e.g.*, [Scott Morton
 18 Rpt., ¶ 109]. Unlike previous would-be Cisco competitors, Arista targeted the high-end of the switch
 19 market, specifically high-speed. *See, e.g.*, [Scott Morton Rpt., ¶ 108]. Arista's products initially enjoyed
 20 their greatest success in the high-frequency trading segment. *See, e.g.*, [Scott Morton Rpt., ¶ 108]. By
 21 late 2014, Arista represented a growing threat to Cisco's share of the Ethernet Switch market. *See, e.g.*,
 22 [Scott Morton Rpt., ¶ 109]. Cisco executives and employees recognized that Arista posed a threat not
 23 only to the high-end of the market but also to enterprise and service provider segments. *See, e.g.*, [Scott
 24 Morton Rpt., ¶ 110; Trial Exhibit 4343 at 4343.00006 ("[REDACTED]
 25 [REDACTED]
 26 [REDACTED]"); Trial Exhibit 4340 at 4340.00001 ("[REDACTED]
 27 [REDACTED]
 28 [REDACTED]") (emphasis in original)].

1 In response to the threat from Arista, Cisco initially attempted to use competitive strategies like
2 product improvements and pricing. *See, e.g.*, [Scott Morton Rpt., ¶ 111]. When these strategies did not
3 work to prevent further gains in Arista market share, Cisco initiated a new strategy centered around a
4 change in its practice regarding what it had marketed as its industry standard CLI. In 2014, Cisco filed
5 a copyright lawsuit against Arista asserting that it had intellectual property and proprietary rights in the
6 CLI itself.

7 Prior to the 2014 copyright lawsuit against Arista, Cisco encouraged customers and competitors
8 to invest in and adopt Cisco's CLI which Cisco referred to as "industry standard." *See, e.g.*, [Trial
9 Exhibit 162 at 162.00001]. Customers and competitors did adopt Cisco's industry standard CLI.
10 Specifically, as Cisco's former CDO Charles Giancarlo will testify, Cisco identified its CLI commands
11 as standard so that customers would not be locked in and would be more comfortable buying from Cisco.
12 *See, e.g.*, [Trial Exhibit 4162 at 4162.00023]. As Arista's expert, Dr. Black, will testify, competitors
13 incorporated commands from Cisco's CLI into their switches and publicly marketed these products as
14 featuring "Cisco-like CLI" or "industry standard CLI. *See, e.g.*, [Trial Exhibit 715 at 715.00001
15 (Document regarding Force10); [Trial Exhibit 782 at 782.00010] (Document regarding Avaya)]. Cisco
16 knew that competitors, including Arista, were using Cisco's CLI and did not seek to stop this use. *See,*
17 *e.g.*, [Trial Exhibit 166 at 166.00058; Trial Exhibit 39 at 0039.00006 (Cascade Insights Arista
18 Competitive Intelligence].

19 Concurrent with the filing of its lawsuits against Arista, Cisco initiated a publicity campaign
20 asserting to the public as well as customers and potential customers that Arista infringed Cisco's
21 copyrights in the CLI and would be forced to use a different CLI by an injunction. *See, e.g.*, [Trial
22 Exhibit 173]. This publicity campaign continued throughout the legal cases, and was aided in large part
23 by blogs written by Cisco's General Counsel, Mark Chandler. *See, e.g.*, [Trial Exhibit 639]. In an effort
24 to spread fear, uncertainty, and doubt (FUD), Cisco employees got "down and dirty" by pointing to
25 Arista's alleged intellectual property violations including accusations of stolen technology. *See, e.g.*,
26 [Trial Exhibit 51 at 51.00002].

27 Dr. Scott Morton will testify that Cisco's actions at the end of 2014 with respect to the CLI to
28 protect its market power represented an attempt to subvert competition on the merits. *See, e.g.*, [Scott

1 Morton Rpt., ¶ 155].

2 **4. Cisco acquired or maintained monopoly power through**
 3 **anticompetitive conduct and/or there was a dangerous probability**
 4 **that Cisco would sooner or later achieve its goal of a monopoly**

5 As discussed above, Arista fact evidence and expert testimony will show that as a result of
 6 Cisco's 2014 change in policy related to the CLI and associated publicity campaign, Cisco acquired or
 7 maintained monopoly power through anticompetitive conduct and/or there was a dangerous probability
 8 that Cisco would sooner or later achieve its goal of a monopoly.

9 **5. Arista's business was injured as a result of Cisco's actions**

10 In an effort to spread fear, uncertainty, and doubt (FUD), Cisco employees [REDACTED]
 11 [REDACTED] the litigation when competing with Arista. *See, e.g.*, [Trial Exhibit 51 at 51.00002]. Arista fact
 12 witnesses, including Anshul Sadana and Kevin McCabe, will testify that sales people as well as senior
 13 executives spent time addressing customers concerns regarding the lawsuit, often after having the issue
 14 raised by Cisco. *See, e.g.*, [Trial Exhibit 235] ([REDACTED]); [Trial
 15 Exhibit 186] ([REDACTED]); [REDACTED]).

16 During the copyright litigation, Cisco's Senior Vice President of data center sales, Frank
 17 Palumbo, testified as Cisco's 30(b)(6) representative that having a Cisco-like CLI was [REDACTED]
 18 to Arista's ability to make sales against Cisco, and Mr. Palumbo testified that a list of 74 major
 19 customers, including [REDACTED]
 20 [REDACTED]
 21 [REDACTED], would not have bought from Arista were it not for its use of a
 22 Cisco-like CLI. *See, e.g.*, [6/7/2016 Frank Palumbo Dep. at 20:2-9, 22:14-20; Trial Exhibit 120 at
 23 120.00015-18] Arista fact witnesses, including Anshul Sadana and Kevin McCabe, will also testify that
 24 Arista lost sales due to litigation concerns from customers that Cisco had identified as placing high value
 25 on the CLI. Documentary evidence will also show the same. For example, [REDACTED]
 26 [REDACTED]
 27 [REDACTED]

1 [REDACTED] *See, e.g., [Trial Exhibit 227 at*
 2 227.00002]. In response, [REDACTED]
 3 [REDACTED]
 4 [REDACTED] *See, e.g., [Trial Exhibit 4449 at 4449.00002, 4449.00003].*
 5 [REDACTED]
 6 [REDACTED] *See, e.g., [Trial Exhibit*
 7 235]. Less than a week later, [REDACTED]. *See,*
 8 *e.g., [Trial Exhibit 233].*

9 Arista fact witnesses, including Mark Foss, will testify that during the period of litigation,
 10 Arista's acquisitions of new customers declined and only started to recover after a favorable ruling in
 11 the copyright case. Dr. Scott Morton will testify about the impact of the decline of new customer
 12 acquisition in terms of lost revenues and profits. *See, e.g., [Scott Morton Rpt., ¶¶ 178-192].*

13 Dr. Scott Morton will testify about how she calculated the damages to Arista from Cisco's policy
 14 change related to the CLI and accompanying litigation and FUD campaign. *See, e.g., [Scott Morton*
 15 *Rpt., ¶¶ 193-242].*

16 Arista fact witnesses, including Anshul Sadana, will testify about how Arista resources were
 17 diverted away from innovative activities due to the time needed to respond to customer concerns stoked
 18 by Cisco's lawsuits and associated FUD campaign. Arista fact witnesses, including Anshul Sadana, will
 19 also testify that the amount of money spent on Arista's research and development is a percentage of its
 20 topline revenue and consequently, if revenues decrease, so too does Arista's research and development
 21 budget.

22 Additionally, Dr. Scott Morton will testify that Cisco's anticompetitive actions harmed not only
 23 Arista but also consumers of Ethernet switches. *See, e.g., [Scott Morton Rpt., ¶ 243].* For example,
 24 customers who would have preferred buying their Ethernet switches from Arista absent a CLI policy
 25 change and the associated lawsuit and FUD campaign were deterred from their first choice purchases
 26 by Cisco's strategy. *See, e.g., [Scott Morton Rpt., ¶¶ 244].*

27 **B. Violation of Section 17200 of the California Business and Professional Code**

28 To prove a violation of Section 17200 of the California Business and Professional Code, Arista

1 must establish that Cisco's conduct related to the CLI is "unfair" in that it "threatens an incipient
 2 violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are
 3 comparable to or the same as a violation of the law, or otherwise significantly threatens or harms
 4 competition." *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 187 (1999). The Court
 5 recognized that because the three prongs of Section 17200 are disjunctive, the "unfair" prong sweeps
 6 more broadly than the federal antitrust laws. See *id.* at 180 ("a practice [can be] prohibited as 'unfair' or
 7 'deceptive' even if not 'unlawful' and vice versa." (internal quotation and citation omitted)). The Court
 8 suggested that federal case law interpreting Section 5 of the FTC Act would provide guidance. See *id.*
 9 at 185-87.

10 As discussed above, Arista will present fact evidence and expert testimony establishing an
 11 antitrust violation. Such a violation meets the requirements for a violation of Section 17200 of the
 12 California Business and Professional Code.

13 **C. Cisco Will Not Be Able to Prove Its Affirmative Defense of Issue and Claim
 14 Preclusion**

15 Cisco has asserted that Arista's claims under Section 2 of the Sherman Act and violation of
 16 Section 17200 of the California Business and Professional Code are barred, in whole or in part, by the
 17 doctrines of claim and issue preclusion based on the earlier copyright case between the parties. *Cisco*
 18 *Systems, Inc. v. Arista Networks, Inc.*, No. 5:14-cv-05344 (N.D. Cal.). ECF No. 230 (Cisco Amended
 19 Answer to Amended Complaint) at 11-12.

20 Arista's claims in this case are not precluded under either doctrine. Cisco has not established that
 21 the elements of these defenses are met. Arista is not relitigating in this litigation claims or issues decided
 22 in the earlier copyright litigation, although the copyright case remains on appeal.

23 **D. Cisco Will Not Be Able to Prove Its Affirmative Defense of a Statute of
 24 Limitations Bar**

25 Cisco has asserted the statute of limitations as an affirmative defense to Arista's claims under
 26 Section 2 of the Sherman Act and violation of Section 17200 of the California Business and Professional
 27 Code. ECF No. 230 (Cisco Amended Answer to Amended Complaint) at 12.

28 Arista will present fact evidence and expert testimony that the anticompetitive act that is the

1 basis for these claims was Cisco closing the CLI in December 2014. Arista asserted its claims under
2 Section 2 of the Sherman Act and violation of Section 17200 of the California Business and Professional
3 Code by filing the present action on February 24, 2016 – within the four year statute of limitations.

4
5 Date: July 30, 2018

Respectfully submitted,

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